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# L G B T LAW NOTES

February 2021



**Biden Administration Declares Pro-LGBTQ+ Policies**

# Biden Administration Declares Pro-LGBTQ+ Policies from Day One; Moves Quickly to Repeal Transgender Military Service Ban

By Arthur S. Leonard

At midday on January 20, 2021, Joseph R. Biden, Jr., and Kamala Harris took their oaths of office as President and Vice-President of the United States. Later that afternoon, President Biden sat in the Oval Office of the White House and signed numerous executive orders and directives, two of which directly address the LGBTQ+ equality goals of his administration. One, titled “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” builds on the Supreme Court’s June 15, 2020, decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, to proclaim a policy of protection from discrimination for LGBTQ+ people under every federal law banning sex discrimination, and staked out progressive policies on how that protection should be interpreted. In the second, titled “Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” the President identified “lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons” as one of the “underserved communities” included in his administration’s commitment to advance “equity.” Just a few days later, on January 25, the President signed an Executive Order ending the Trump Administration’s policy against transgender people enlisting or serving in the armed forces, titled “Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform.” On January 26, the President signed a Memorandum to the Department of Housing and Urban Development, titled “Memo on Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practice and Policies,” which mentioned the LGBTQ+ community among those who

have been the victims of such policies and charging HUD to seek ways to effectuate equitable housing policies. The identification of the LGBTQ+ community as an “underserved community” in a June 20 Executive Order also rendered relevant subsequent equity Orders and Memoranda, especially one concerning equitable access to health care under Medicaid.

The major Orders are worth extensive quotation, as they reflect a careful effort during the transition by the President and his staff to frame Orders that will set the tone from the top of this Administration. In describing the policies that he seeks to establish through the LGBTQ Anti-Discrimination Executive Order, the President stated:

“Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.”

After referring specifically to *Bostock*’s holding that “Title VII’s prohibition on discrimination ‘because of . . . sex’ covers discrimination on the basis of gender identity and sexual orientation,” he asserted, “Under *Bostock*’s reasoning, laws that prohibit sex discrimination . . . prohibit

discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary,” referencing specifically three examples: the Fair Housing Act, Title IX of the Education Amendments of 1972, and the Immigration and Nationality Act. For those seeking a full list of federal laws affected, we can thank Supreme Court Justice Samuel Alito and his clerks for the Appendix attached to his *Bostock* dissent listing 100 federal law provisions that he suggested would be affected by the Court’s holding, and which will be permanently memorialized with the opinion in Volume 590 of the U.S. Reports.

Biden’s Order thus takes sides on some controversial issues in opposition to the positions taken by his predecessor, such as the right of transgender students to use facilities and participate in sports activities consistent with their gender identity. One consequence of the Order should involve the Justice Department changing its position in pending litigation and withdrawing briefing submitted during the prior Administration.

In another Order, President Biden directed that agencies withdraw proposed Trump Administration regulations that have not yet been published in final form in the Federal Register. As to those that have been published but have not yet gone into effect, agencies are directed to delay the effective dates while determining whether the regulations are consistent with Biden Administration policies. It is likely that the President will ask Congress to exercise its authority under the Congressional Review Act to repeal regulations that are within the 60-legislative-day window period, which are not subject to filibustering in the Senate and can be repealed by



simple majority votes. (During the early months of the Trump Administration, Congress repealed more than a dozen Obama Administration regulations under the CRA.) In some instances, the Administration will need to undergo Administrative Procedure Act requirements for revoking, amending or replacing promulgated regulations, which will require notice and comment periods that will take some time to accomplish.

Biden went beyond declaring policy in the LGBTQ+ Anti-Discrimination EO, setting a mandate for all the Executive Branch agencies that come under his leadership to “consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this Order.” He gave agency heads 100 days to develop a plan of action, while noting that the “independent agencies” defined in 44 U.S.C. 3502(5) are not covered by this requirement, because they do not come under his authority as Chief Executive. But, of course there is nothing to stop those agencies from also taking steps, as appropriate, to effectuate the same policies, and within the first few years of his Administration, he will have appointed enough new commissioners, board members, etc., to those agencies to tip the majorities to Democrats and Independents, as the statutes establishing independent agencies generally require staggered terms and prohibit more than a bare majority of policy-making members to belong to the same political party.

The directive is clear: to revoke, rescind or replace the Trump Administration policies that foster discrimination against people because of their sexual orientation or gender identity and to replace them with LGBTQ+ affirmative policies. In quick response, the Justice Department removed from its website a memorandum that had been posted shortly before the Inauguration that had taken a narrow view of *Bostock*, cautioning against applying its reasoning outside of Title VII to statutes adopted at other times

on other subjects. The acting head of the Civil Rights Division said the memorandum was inconsistent with the new Executive Order and seemed to be based more on Justice Alito’s dissent than on the Court’s opinion.

The second Order, establishing an equity policy inclusive of the LGBTQ+ community, is just as significant. In this Order, the President charges the Executive Branch to undertake a detailed self-examination to determine the extent to which “underserved communities” have not enjoyed full participation in the benefits of federal programs and programs funded by the federal government, and to apply the equity principle to take affirmative steps to see that such communities receive their fair share of the benefits of such programs. This is a mandate for outreach, public education, and efforts to assure that people are not excluded. Importantly, this Order expressly revokes President Trump’s Executive Order 13950, the EO against any diversity training by executive branch entities or their contractors comprising training that addresses systemic racism, sexism, homophobia, etc. The agency heads are directed to review proposed and existing agency actions relating to that Order and, within 60 days of January 20, “shall . . . consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or grants pursuant to Executive Order 13950, as appropriate and consistent with applicable law.”

After Trump had issued the now-revoked Order, there were reports of many people with contracts to provide consulting and diversity training for federal agencies and federal contractors being told that scheduled trainings were being cancelled and contracts were being suspended or terminated. These included diversity training programs provided to federal agencies and grantees by LGBTQ organizations. Those actions should be reversed in response to the Equity EO.

The third Executive Order, on transgender military service, issued on January 25, revoked Trump’s Presidential Memorandum of March

23, 2018, which had accepted then-Secretary of Defense James Mattis’s recommendations on how to implement the transgender ban, and stated that Trump’s Presidential Memorandum of August 25, 2017, which had made more concrete the transgender ban that Trump had announced on Twitter a month earlier (which caught the Defense Department by surprise and had no implementation details), “remains revoked.” Biden stated the Administration’s policy: “All Americans who are qualified to serve in the Armed Forces of the United States should be able to serve. The All-Volunteer Force thrives when it is composed of diverse Americans who can meet the rigorous standards for military service and an inclusive military strengthens our national security. It is my conviction as Commander in Chief of the Armed Forces that gender identity should not be a bar to military service.” Biden referenced the “meticulous, comprehensive study” that had been undertaken in 2016 by the Defense Department, which resulted in then-Secretary of Defense Ashton Carter’s announcement at the end of June 2016 lifting the formal bar on transgender military service in then-existing regulations, while deferring the opening of enlistment for a year. Biden stated his agreement with the conclusions of the 2016 study, and asserted: “Therefore, it shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet the appropriate standards shall be able to do so openly and free from discrimination.” He charged the Secretaries of Defense and Homeland Security to take the necessary steps to implement this policy, and report back to him on their progress in 60 days. Among other things, military records are to be corrected concerning actions taken under the Trump policies, and those who were forced out of the service and want to return will be allowed to do so provided they currently meet the appropriate standards. The process that Secretary Carter had begun to establish procedures for enlistment will have to be completed, since Secretary

Mattis had deferred that issue to the end of 2017, and before then Trump's tweet established an absolute ban on enlistment of anybody who had been diagnosed with gender dysphoria. The Biden Order is full of detailed direction anticipating the various adjustments that need to be made in military procedures to implement the policy it announces.

In addition, on January 26 President Biden issued a memorandum titled "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," which references the LGBTQ+ community among those who have suffered from discriminatory housing practices, and charges the Department of Housing and Urban Development to review several Trump Executive Orders that had undermined prior policies for addressing housing discrimination, such as one that basically gutted the use of disparate impact theory to address housing practices that disadvantage minorities.

In addition to actions and Orders, of course, the President made history by nominating the first out gay person to be the head of a federal department: former South Bend, Indiana, Mayor Pete Buttigieg to be Secretary of Transportation. He nominated out transgender Dr. Rachel Levine to be Assistant Secretary of Health. She will be the first out transgender person to serve in a subcabinet position. He also nominated out lesbian Suzanne Goldberg to be Deputy Assistant Secretary of Education for Strategic Operations and Outreach and for the Office of Civil Rights, with an Acting Assistant Secretary appointment so she could start work immediately pending confirmation. Jesse Salazar was nominated as Deputy Assistant Secretary of Defense (Industrial Policy). The Victory Institute reported that as of Inauguration Day President Biden had announced appointments of more than a dozen out LGBTQ people to significant Executive Branch positions, including Jamal Bowman as Deputy Press Secretary in the Defense Department, Stuart Delery as Deputy

Counsel to the President, and Ned Price as State Department Spokesperson. More out LGBTQ+ appointments were expected as the President nominates diplomats, judges, and agency and board members and commissioners. Among other announcements, newly-confirmed Secretary of State Antony Blinken announced that he would be reviving the position of Special Envoy for LGBTQ issues in the State Department, which the Trump Administration allowed to lapse, and Blinken indicated that he would countermand the policy of his immediate predecessors which had prohibited the display of Pride Flags by U.S. embassies and ended the practice of embassies holding Pride Month Receptions. ■

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## Federal Court Enjoins HHS & EEOC From Requiring Catholic Plaintiffs to Perform or Provide Gender Transition Services

*By Arthur S. Leonard*

Ruling on the last full day of the Trump Administration, one of the federal trial judges appointed by the outgoing president ruled that the Religious Freedom Restoration Act (RFRA) bars the federal government from enforcing the non-discrimination requirement of the Affordable Care Act (ACA) Section 1557 or Title VII of the Civil Rights Act of 1964 against a coalition of entities affiliated with the Catholic Church to require them either to fund or perform gender transition procedures. *Religious Sisters of Mercy v. Azar*, 2021 WL 191009, 2021 U.S. Dist. LEXIS 9156 (D.N.D., January 19, 2021). Chief Judge Peter D. Welte denied summary judgment to co-plaintiff the State of North Dakota, which sought a declaration that it is not required to provide such procedures in its state health institutions or to its employees or through its Medicaid program, and found that the Catholic Plaintiffs lacked standing on their claims concerning performance of abortions and sterilizations, as the court found that various provisions of the ACA and other federal laws already relieved them of obligations in that regard.

Judge Welte issued his opinion just a few days after hearing oral argument on the summary judgment motions, but the case has been pending for a long time and it is likely that he had most of the lengthy, analytical opinion drafted well in advance of the argument, based on the suit papers.